

Note: the original hard copy of this report is **20 pages**.

To search for keywords use Edit>Find



Unrepresented parties and the Equal Opportunity Tribunal: a survey of Tribunals and recommendations for change

Mary Mervat Rebehy, 2000, Law and Justice Foundation of NSW, Sydney

<http://lawfoundation.net.au/report/eot>

This project examines procedures in comparable Tribunals, and makes recommendations to the Administrative Decisions Tribunal (NSW) about the procedures in the Equal Opportunity Division (EOD), in order to make the EOD more accessible, especially to unrepresented parties.

Recommendations

This report surveyed the practices of a number of tribunals whose operations were similar to the then Equal Opportunity Tribunal (NSW).

The Equal Opportunity Tribunal is now the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW). The procedures used in conducting hearings remain largely unchanged by the merger of the jurisdictions, and the report and its recommendation continue to be relevant.

In relation to the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW):

1. Reduce formalities in proceedings

The Tribunal ought to take all steps to make use of its powers under the Anti-Discrimination Act to reduce the formality of the hearings and proceedings, and to take active steps to inform itself of matters it considers relevant to determining the issues before it.

2. Consider whether legal representation ought to be allowed in each case

The Tribunal ought to make use of its powers under s101 of the Anti-Discrimination Act (legal representation by leave of the Tribunal only) and give consideration to whether legal representation is appropriate in *each* case. One of the factors the Tribunal should consider is whether the representation of one party and not the other would lead to the unrepresented party being disadvantaged, and whether the availability of counsel assisting precludes the need for parties to be represented.

3. A duty solicitor

Unrepresented parties in matters before the Tribunal ought to have access to assistance, preferably at all stages of the proceedings.

4. Counsel assisting

Counsel assisting could be appointed to prepare matters by requesting relevant material or reports, conducting cross-examination, and making submissions before the Tribunal.

5. An associate to members

Tribunal members are currently appointed part time (at call). An associate to assist the Tribunal members with questions of law, legal research, recent relevant decisions, and other duties usually undertaken by an associate would allow the members to have up to date information and assist with consistency in decisions and judgements.

6. Training

Members should be provided with training on appointment to the Tribunal. They should be better resourced and kept up to date with, for example, Bench books, conferences, regular updates on relevant decisions and so on.

7. The role of the Registry

The role of the Registry ought to be developed and extended, perhaps by the delegation of some administrative and procedural functions. Training should also be provided to Registry staff. The Registrar should be able to issue subpoenas or make directions by consent between the parties, set timetables for the conduct of matters, and should be trained to conduct mediations.

The Registry could conduct regular information sessions and produce written material in plain English on the procedures of the Tribunal.

8. Case management

The Tribunal should adopt a system of differential case management. Matters can be identified at their outset as either direct, standard or complex. Once identified the matter follows a certain track or timetable to ensure it is dealt with expeditiously and in an appropriate manner.

9. Alternative dispute resolution

The Tribunal should encourage parties to attend mediation as early on in the proceedings as possible. Only members with appropriate training should conduct mediations, but all members (both judicial and non-judicial) should have access to such training.

10. Tenure of members

The number of members should be reduced. Fewer members would mean that members have greater opportunity to sit on hearings and attend training. Appointment of members ought to be on a permanent part time basis or at least involve some regular pattern of attendance. There ought to be at least one full time judicial member.

11. The role of the President's Report

The status of the President's Report ought to be decided, and perhaps more use made of the Report as a summary of the complaint.

12. Community consultation

The Tribunal should conduct community consultation with members of the legal profession who appear on a regular basis before the Tribunal to allow the opportunity for feedback from the users of its services.

13. Liaison between the Anti-Discrimination Board and the Equal Opportunity Tribunal

It is essential for the ADB and the EOT to keep open lines of communication and liaise regularly on issues of mutual concern.

The Steering Committee

David Hillard	Pro Bono Director, Clayton Utz Solicitors
Associate Professor Rosemary Hunter	Principal Researcher, Justice Research Centre
Gillian McAllister	Research Consultant
Simon Rice	Director, Law Foundation of NSW; Judicial Member, Equal Opportunity Division of the Administrative Decisions Tribunal
Cathy Szczgielski	Registrar, Administrative Decisions Tribunal
Amanda Tibby	Senior Solicitor, Civil Law Branch, Legal Aid Commission of NSW

Note: the positions identified are those held by members of the Steering Committee during the project.

List of the Tribunals surveyed

Name of Tribunal	Abbreviation
Administrative Decisions Tribunal (NSW)	ADT
Anti-Discrimination Board	ADB
ACT Discrimination Tribunal	DT ACT
Administrative Appeals Tribunal	AAT
Community Services Appeal Tribunal	CSAT
Consumer Claims Tribunal ¹	CCT
Equal Opportunity Division of the NSW Administrative Decisions Tribunal	EOD
Equal Opportunity Tribunal NSW ²	EOT
Equal Opportunity Tribunal SA	EOT SA
Equal Opportunity Tribunal WA	EOT WA
Human Rights and Equal Opportunity Commission	HREOC
Legal Services Appeals Tribunal ³	LST
NT Anti-Discrimination Board	ADB NT
Refugee Review Tribunal	RRT
Residential Tenancy Tribunal ⁴	RTT
Veterinary Surgeons Disciplinary Tribunal	VDT

Background: The Equal Opportunity Division of the NSW Administrative Decisions Tribunal

1. The Equal Opportunity Tribunal of NSW was established under the *Anti-Discrimination Act 1977* (NSW) (the ADA) to

investigate complaints referred to it by the President of the Anti-Discrimination Board (ADB).

2. In 1997 the Tribunal became the Equal Opportunity Divisions (EOD) of the newly established NSW Administrative Decisions Tribunal (ADT). The ADB and ADT deal with complaints of discrimination under the Anti-Discrimination Act.

3. A complaint is made in writing to the ADB and allocated to an officer who investigates it. If the matter is unable to be resolved at the ADB, either through conciliation or other means, the complaint and result of the investigation are compiled into the President's Report, which is forwarded to the ADT.

4. The ADT is required to 'hold an inquiry' into each complaint referred by the ADB. The ADT does not review administrative decisions, but conducts enquiries and makes decisions on findings of fact and law.

5. The EOD of the ADT is a jurisdiction where complainants are often disempowered and disadvantaged through language difficulties, or physical or intellectual impairment. Unrepresented complainants seem to face significant difficulties in complying with the procedures of the ADT.

6. In 1995 the then EOT collected statistics, comparing the progress of matters to the Tribunal when one party was unrepresented with matters where both parties were represented. The data suggested that when a complainant was unrepresented, matters took twice as long from referral to completion. They required twice as many directions hearings and final hearings took longer to complete.

7. As a result of this information, the then EOT made a submission to the Law Foundation of NSW who funded a part time duty solicitor for 12 months. The solicitor was to assist unrepresented parties and to appear with them at the first directions hearing. This seeding grant resulted in the Attorney General's Department funding, on a permanent basis, a solicitor from the Legal Aid Commission of NSW to attend the EOD on a part time basis as a duty solicitor.

8. During the pilot duty solicitor project in 1996/7, there were 166 new matters received by the then EOT. Of these the duty solicitor appeared in 81; in only 4 of these 81 did a solicitor appear for the respondent. A comparison of the running time of the directions hearings conducted before the duty solicitor pilot, and after the duty solicitor pilot, showed a significant reduction in the running time.

9. The Law Foundation of NSW approved an extension of the duty solicitor project to allow the collection of information and the formulation of recommendations for changes to the EOD procedures which would be of assistance to the unrepresented parties in light of the duty solicitor experience.

10. This small project cannot possibly canvass all the matters to be considered when examining Tribunal procedures and unrepresented parties. The recommendations will, however, assist the ADT to provide flexible and accessible services in an impartial and cost effective manner.

11. This research and report was conducted and written on a part time basis from 1997 to 1999. The information was correct at the time it was collected. The following account reflects the practice of the ADT at 1 January 2000.

The complaint procedure

12. After conducting an investigation of a complaint, the President of the ADB refers a complaint to the ADT when the President is unable to resolve the complaint. If the President declines a complaint, for example as lacking in substance, the complainant can in any event require the matter to be referred to the ADT.

13. The President prepares a Report to the ADT which contains a summary of the complaint, the initial letter of complaint, and details of the investigation. There is no reference in the Report to attempts made to conciliate, as reference to conciliation is inadmissible in any ADT proceedings (Section 94(2) Anti-Discrimination Act).

14. Once the referral of the complaint is received by the ADT, the following procedure takes place:

- The parties are notified in writing of the referral, and are advised of a directions hearing. The parties receive a copy of the President's Report and some information about the Tribunal procedure.
- At the directions hearing, a full Tribunal sits: two non judicial members and the Deputy President of the ADT, who is head of the EOD. The directions hearings are an opportunity to determine the progress of the matter to hearing. The parties are expected to advise whether:
 - they wish their matter to be set down for a hearing.
 - they wish to have the 'usual directions' made. The usual directions are based on the District Court Rules timetable: 28 days for complainants to file points of claim and statements of evidence, 28 days for respondents to file points of defence, 14 days to reply, and so on. If complied with, the timetable is complete in about 3 months.
 - they agree to attend mediation to attempt a settlement.
- leave is sought for legal representation. Although the *Administrative Decisions Tribunal Act 1997* (NSW) provides that legal representation is available by leave, in practice leave is not formally sought and is rarely, if ever, denied.
- Many parties attend a mediation conference to attempt a settlement. Mediation is conducted by a judicial member on the mediation panel of the EOD. If the matter does not settle at the mediation, the complaint goes to a hearing.
- Once the timetable has been complied with, the Registrar allocates a hearing date.
- Matters are often listed for further directions on interlocutory issues such as the issue of subpoena, non-compliance with directions, or applications to strike out complaints.
- The EOD hearings are conventional in appearance. They are conducted in open court unless the Tribunal otherwise orders or the parties agree.

- During a hearing, the President's Report is usually tendered and both parties present their case. Parties are expected to call their witnesses, tender material into evidence, object to material and make opening and closing submissions. They are expected to cross examine witnesses and make submissions on relevant law.
- The duration of a typical hearing before the EOD is 2-3 days, as estimated by Registry staff.
- Appeals from the EOD were made to the Supreme Court of New South Wales, but are now made to the appeal panel of the ADT.

The complainants

15. Complainants before the EOD are people who feel they have been disadvantaged, mistreated or prejudiced due to some personal factor such as their race, gender, homosexuality, marital status or disability. They may have language difficulties, or a physical or intellectual impairment.

16. Complainants come to the EOD seeking redress for alleged discrimination; the relationship between the parties is such that the complainant is usually the less powerful party such as an employee or a job applicant.

The respondents

17. Respondents are most commonly companies or large organisations. The majority of respondents are government organisations and/or employers, and are legally represented.

The statutory procedures in the Equal Opportunities Division

18. The procedures in the former Equal Opportunity Tribunal were governed by Part 9 Division 3 of the ADA. Sections of that Act have been repealed by the ADT Act, and the procedures in the Equal Opportunity Division of the ADT are now governed by both the ADA and Chapter 6 of the ADT Act.

19. Provisions relating to the functions of the ADT in its Equal Opportunity jurisdiction are in sections 95-118 of the ADA. Provisions relating to the procedures in the ADT generally are in sections 67-111 of the ADT Act.

Introduction to the project

Aim of the project

20. The project examines procedures in comparable Tribunals, and makes recommendations to the ADT about procedures in the EOD, in order to make the EOD more accessible, especially to unrepresented parties.

Research method

Survey

21. Research conducted in 1996/7 by the Centre for Legal Process at the Law Foundation of NSW recorded all Tribunals operating in NSW. From that list, a project steering committee selected 17 Tribunals which were known to have policies to assist people of non-English speaking background, people with disabilities, and unrepresented parties.

22. Due to the inaccessibility, or low level, of business in some Tribunals (e.g. the Boxing Appeals Tribunal heard one matter in the period 1986-1998), 12 NSW Tribunals were surveyed. In addition, the anti-discrimination jurisdictions in other States were surveyed.

23. A questionnaire for the Tribunals was developed based on a survey conducted by Professor Jack Goldring in his 1994 survey of Accessibility of Tribunals, and interviews were conducted with Registrars of each of the Tribunals. The questionnaire collected information on Tribunal policy and procedure, and some subjective information on the perceived effectiveness of their policies for accessibility.

Community consultation

24. A meeting of users of the EOT was convened, principally solicitors from the public and private sectors, and barristers and members of the EOT. The consultation provided the opportunity to comment on the EOT's procedures and to make recommendations for change. As this project was an extension of the duty solicitor pilot project, some of the recommendations are drawn from the duty solicitor's experience and contact with unrepresented parties.

Literature search

25. A limited literature review was carried out. This literature is referenced in this report and listed in the [Bibliography](#).

Discussion

Different Tribunal models

26. The survey conducted for the project makes clear that there is little consistency or standard form of practice among the various Tribunals. Each Tribunal has established its own means of operation, and there is no standard approach to issues of accessibility. Even among Tribunals having the same functions, for example the various anti-discrimination jurisdictions,

procedures vary greatly. Different methods appear to be influenced by a range of factors, including establishing legislation, the size of the case load, and subjective views within the Tribunals.

27. Despite the range of approaches, most Tribunals operated within one of the following models.

The administrative model

28. Some Tribunals make decisions based on documents: the complaint, the response and supporting evidence are submitted in writing and a decision is made without an oral hearing. These Tribunals were not surveyed for purposes of this project.

The court model

29. In this model the Tribunal adopts the practice and procedures of a conventional court. This provides a framework for managing cases, such as standard directions requiring the parties to attend for a call-over, or a preliminary directions hearing at which orders are made for the filing of documents within a timetable. It is usual in such Tribunals for hearings not to be set until all documents are filed. The hearing procedures are adversarial and to the observer there is little to distinguish these proceedings from that of any court.

The pro-active model

30. In such Tribunals, once a complaint has been lodged a complainant receives assistance from the Tribunal. While the level of involvement of the Tribunal in investigating or conducting the complaint varies, these Tribunals relieve the complainant of the onus of conducting the complaint. This is done by:

- the use of counsel assisting or investigation officers to prepare the matter for hearing, and
- the use of counsel assisting and the Tribunal's power to make its own enquiries, during the hearing.

Unrepresented parties in tribunals

The literature

31. In the limited literature on unrepresented parties in Tribunals, the following issues are investigated:

- the extent to which Tribunals ought to conduct their proceedings in a formal or informal manner (Gill, 1989)
- the effect that formal or informal procedures have on unrepresented parties (Genn, 1993)
- the political environment in which Tribunals operate (Allars, 1993)
- accessibility issues generally (Goldring, 1994)

32. There appears to be general support for the thesis that unrepresented complainants achieve less favourable outcomes than do represented parties (Genn, 1993).

33. Goldring's research appears to confirm that unrepresented parties, but in particular unrepresented complainants, are significantly disadvantaged when conducting their own matters before Tribunals:

Unrepresented parties may suffer a considerable disadvantage because they are unable to make the most of their opportunities..... The formalities of court procedure have the effect of distancing a proceedings from the experience of most ordinary people and thus place them at a significant disadvantage. (Goldring, 1994, pp. 180)

34. Genn's research shows that representation gives an advantage to the represented party, and that complainants who are represented are more likely to achieve a favourable outcome.

35. Genn's research further shows that even when procedures are informal, unrepresented parties are disadvantaged when the procedures remain adversarial. Genn highlights the fact that informal procedures often hide traps for unrepresented complainants, because they 'cannot know what facts they must prove, nor what items of evidence might constitute sufficient proof to establish their case' (Genn, 1993).

36. Genn makes the point that Tribunals need to be aware of the difference between 'procedural' and 'substantive' informality: it is insufficient to simplify only the requirements for the conduct of the matter; the unrepresented complainant must also be assisted during the hearing itself.

The statistics

37. The experience of the EOT reflects the empirical findings. The following summary was compiled by the EOT for matters in 1995:

Median time from referral to completion	
Both parties legally represented	9.0 months
Complainant unrepresented throughout	17.5 months
Complainant unrepresented for part of proceedings	8.5 months
Respondent unrepresented throughout	6.0 months
Median number of directions hearings	

Both parties legally represented	2
Complainant unrepresented at preliminary directions	4.5
Respondent unrepresented at preliminary directions	1
Median number of hearing days	
Both parties legally represented	2 days
Complainant unrepresented at hearing	3 days

38. The anecdotal experience of the duty solicitor supports these figures. Unrepresented parties often reported to the duty solicitor that they felt lost during the proceedings, or that in fact they failed to understand what was required of them even though they had indicated to the Tribunal members that they understood.

39. If they understood what was required, many complainants were still unable to comply with, say, the preparation of points of claim, statements of evidence, subpoena, and so on. These difficulties appear to be worse for, but not exclusive to, those for whom English is a second language or who have some disability.

40. Unrepresented parties often reported to the duty solicitor that they were feeling 'out of their depth', or perceived that they were disadvantaged during a hearing, particularly when the other party had legal representation. One unrepresented party commented '(I felt) like Mr. Bean playing basketball with Michael Jordan'. Unrepresented parties sought assistance from the duty solicitor on cross-examination, making submissions on point of law and on final submissions.

The Tribunals' experience

41. The survey of Tribunals asked whether the Tribunal believed that a party was disadvantaged in the Tribunal if they were unrepresented. Four answered 'no', four answered 'yes' and four gave qualified 'no' answers.

42. The four Tribunals that clearly felt that unrepresented parties were *not* disadvantaged were Tribunals that identified themselves as operating on the pro-active model, or were Tribunals where all parties are unrepresented. Each had procedures in place specifically to assist unrepresented parties and felt that reducing the amount of legal representation in the Tribunal was a very important factor in making things fairer for unrepresented parties and for the speedy resolution of matters.

43. The four Tribunals that felt that unrepresented parties *were* disadvantaged were those with a court-based model of procedure. These Tribunals tend to be adversarial in their proceedings. The interviewees felt that unrepresented parties:

- were disadvantaged against represented parties
- had difficulty in understanding the procedures and the law
- lack skills in conducting cross examination and making submissions, and
- were generally unable to act as competent advocates for themselves.

44. The four Tribunals that gave qualified responses all suggested that unrepresented parties were not disadvantaged as there were procedures in place to assist them. These Tribunals all had forms of procedure which were neither fully the court model nor fully the pro-active model, but were a mix of inquisitorial and adversarial procedures.

45. The interviewees recognised that in an adversarial hearing, an unrepresented party would be likely to be disadvantaged through not having an advocate. Interviewees felt that once unrepresented parties had to cope with adversarial aspects of the proceedings, they were disadvantaged.

Recommendations

1. Reduce formalities in proceedings

The Tribunal ought to take all steps to make use of its powers under the Anti-Discrimination Act to reduce the formality of the hearings and proceedings, and to take active steps to inform itself of matters it considers relevant to determining the issues before it.

2. Consider whether legal representation ought to be allowed in each case

The Tribunal ought to make use of its powers under s101 of the Anti-Discrimination Act (legal representation by leave of the Tribunal only) and give consideration to whether legal representation is appropriate in each case. One of the factors the Tribunal should consider is whether the representation of one party and not the other would lead to the unrepresented party being disadvantaged, and whether the availability of counsel assisting precludes the need for parties to be represented.

Assistance to parties

46. Tribunals were asked to identify services and procedures which they felt assisted unrepresented parties. The three activities identified were:

- provision of duty solicitors
- provision of counsel assisting
- outreach programs

47. Tribunals who did not provide these resources nominated them as ones they would like to be able to provide.

Duty solicitors

48. A duty solicitor assists unrepresented parties appearing for a Tribunal.

49. The duty solicitor pilot program in the then EOT provided advice at all stages of the proceedings, appearing for unrepresented parties at directions hearings but not at final hearings. The experience of the pilot program was that parties who were left to cope on their own at the hearing experienced considerable difficulties.

50. Ideally a duty solicitor would have the capacity to take on certain matters to finality, perhaps appearing at hearings. In New South Wales, legal aid is currently available for matters in the EOD subject to a means and merit test but, due to funding restrictions, legal aid is often available only for matters with a public interest component.

51. Of the interstate jurisdictions, those in South Australia, Western Australia and the Northern Territory had some form of legal representation available for unrepresented complainants.

52. In South Australia and Western Australia the representation is provided by the referring body, such as the Anti-Discrimination Board, only if the complaint was referred on the basis that it could not be conciliated. No representation is provided by the referring body if it considered the referred complaint to be lacking substance.

53. In the Northern Territory, in the case of unrepresented complainants the Tribunal appoints counsel assisting to conduct cross examination and to assist the Tribunal.

Counsel assisting

54. Counsel appointed by the Tribunal prepare the matter for hearing. They usually appear at the hearing, assisting the Tribunal on points of law, questioning witnesses and requesting parties to collect necessary evidence, for example medical reports. The Northern Territory Tribunal has a list of barristers who are appointed to act as counsel assisting. If counsel assisting has been appointed then legal representation is usually not permitted.

55. Some Tribunals have a legal officer acting in the role of an associate to the members. The officer carries out legal research and assists with the collation of evidence etc. This overcomes the difficulty the Tribunal has in relying on an unrepresented party to make submissions on relevant points of law and authorities.

Outreach programs

56. In such programs, officers of the Tribunal contact parties when the matter is first received by the Tribunal, and actively provide information on and assistance with the Tribunal's procedures.

Recommendations

3. A duty solicitor

Unrepresented parties in matters before the Tribunal ought to have access to assistance, preferably at all stages of the proceedings.

4. Counsel assisting

Counsel assisting could be appointed to prepare matters by requesting relevant material or reports, conducting cross-examination, and making submissions before the Tribunal.

5. An associate to members

Tribunal members are currently appointed part time (at call). An associate to assist the Tribunal members with questions of law, legal research, recent relevant decisions, and other duties usually undertaken by an associate would allow the members to have up to date information and assist with consistency in decisions and judgements.

Members' training

57. Seven of the twelve Tribunals surveyed provide training to new members on their appointment. In addition, one Tribunal makes appointments on the basis of the necessary level of expertise to discharge the Tribunal's functions, and has a full time chair person. Another provides a mentor system where new members are assisted by a long-serving member.

58. Most Tribunals provide some form of continuing information to the Tribunal members regarding recent developments. The amount of training varied widely from one Tribunal to another, however, most held at least an annual conference. One Tribunal held training sessions three or four times a year and two held monthly training sessions with compulsory attendance for Tribunal members.

59. Methods of keeping members up to date include Bench books, newsletters and case notes. All Tribunals offering mediation or some other form of alternative dispute resolution required relevant members to undertake training in alternative dispute resolution.

Recommendation

6. Training

Members should be provided with training on appointment to the Tribunal. They should be better resourced and kept up to date with, for example, Bench books, conferences, regular updates on relevant decisions and so on.

The role of the Registry

60. Many of the Tribunals surveyed had a full time or part time senior judicial member. Such an arrangement allows a partnership to develop between the Registrar and the judicial member with a clear division of responsibility: administrative

matters to the Registrar, and legal and procedural issues to the judicial member.

61. Arrangements in the EOD are such that a fully constituted Tribunal must deal with all aspects of the hearing, from consent directions and the issue of subpoenas through to interlocutory directions. Tribunal appearances are consequently more frequent, and the issues more difficult for an unrepresented party to deal with before a full Tribunal on every occasion. There are also increased costs for represented parties.

62. In some Tribunals surveyed the staff conduct 'Registrar's tours' of the Registry and court room for parties, information sessions for unrepresented parties, and Registrar's conferences where interlocutory orders can be made by consent. As well, some Registrars have an active role in alternative dispute resolution by conducting mediation or settlement conferences.

Recommendation

7. The role of the Registry

The role of the Registry ought to be developed and extended, perhaps by the delegation of some administrative and procedural functions. Training should also be provided to Registry staff. The Registrar should be able to issue subpoenas or make directions by consent between the parties, set timetables for the conduct of matters, and should be trained to conduct mediations.

The Registry could conduct regular information sessions and produce written material in plain English on the procedures of the Tribunal.

Case management

63. The EOD receives a range of matters of varying complexity. Some matters involve difficult issues of law or fact, while others are relatively straightforward requiring a decision based on a finding of fact. In complex cases, both parties are usually legally represented. Procedures in the EOD have had to cater to the most complex of cases, resulting in more straightforward matters having to comply with procedures not always necessary or appropriate.

64. Several of the Tribunals surveyed use a 'differential case management' procedure which adopts a flexible approach depending on the needs of the individual case. Timetables are set for the completion of matters according to their type and content. If a matter is not heard or resolved within the allocated time, the Tribunal then intervenes and deals with it promptly and directly.

Recommendation

8. Case management

The Tribunal should adopt a system of differential case management. Matters can be identified at their outset as either direct, standard or complex. Once identified the matter follows a certain track or timetable to ensure it is dealt with expeditiously and in an appropriate manner.

Alternative dispute resolution

65. Several of the interviewees in the survey noted the opportunity to resolve matters before they went to hearing was of benefit in several ways.

66. The availability of alternative dispute resolution in the EOD can only be advantageous. It increases the prospect of resolving a matter at reduced cost, and may relieve unrepresented parties of the difficulty of conducting a hearing. In any event, the process, if unsuccessful, will help clarify issues in dispute and identify conditions under which a party will resolve the matter.

67. The ADA and the ADT Act encourage the Tribunal to secure settlement of a complaint prior to a hearing. Currently the conduct of mediation is confined to selected judicial members with training. Any interested Tribunal member should be provided with training and encouraged to conduct mediation; non-judicial members bring to the Tribunal a range of skills which may give them an advantage in being able to resolve matters where some special knowledge is required.

Recommendation

9. Alternative dispute resolution

The Tribunal should encourage parties to attend mediation as early on in the proceedings as possible. Only members with appropriate training should conduct mediations, but all members (both judicial and non-judicial) should have access to such training.

Additional issues

Tenure of members

68. Members of Tribunals are appointed on various bases:

- full time
- part time permanent
- part time at call

69. There are over 30 members, judicial and non-judicial, of the EOD, and all are appointed on a 'part time at call' basis. This means that a member has little contact with the Tribunal, the Registry, other members and the Tribunal's proceedings, except at meetings and through occasional hearings.

70. It is difficult for part time members to keep up to date with procedures, practice and law, and to provide consistency in their judgments and the way in which they manage proceedings.

71. The members appointed on a part time at call basis place greater reliance than they might otherwise do on submissions from the parties; obviously unrepresented parties can provide little assistance in this regard. Unrepresented parties require Tribunal members to be more involved in the hearing process and to provide assistance to them, but cannot rely on this occurring.

72. The Deputy President of the ADT and head of the EOD is usually a judge of the District Court of NSW. They are required to attend to their duties in the EOD as well as to their full time duties. The result is that the only people who are available to the Tribunal on a permanent and regular basis are the Registry staff and the President of the ADT.

73. A reduction in the number of members appointed to the EOD would assist by allowing the Tribunal to better serve the members, and by allowing the members the opportunity to be involved in more hearings. The Tribunal would be better able to meet the cost of supplying information to all its members, and to provide training and continuing support. Osborne observed in 1992 that 'an examination of the French system suggests that there might be advantages in having a ... hard core of career members (which) would facilitate the development of procedures peculiarly suited to the work of the Tribunal'.

Recommendation

10. Tenure of members

The number of members should be reduced. Fewer members would mean that members have greater opportunity to sit on hearings and attend training. Appointment of members ought to be on a permanent part time basis or at least involve some regular pattern of attendance. There ought to be at least one full time judicial member.

President's Report

74. The Anti-Discrimination Act requires a referral of the complaint from the Anti-Discrimination Board to the EOD to be accompanied by a Report from the President. The legal standing of the Report is unclear, as is the manner in which it should be dealt with.

75. Questions surrounding the Report include:

- Is the Report available to Tribunal members before the commencement of the hearing?
- Is the Report amenable to tender and objection as if it were evidence?
- Does the Report have any special status as a document specifically referred to in the ADA?
- To what extent can the Tribunal rely on the content of the Report in light of evidence and submissions for the parties?

76. Clearly the Report has the potential to relieve unrepresented parties of the need to file points of claim. The experience of the duty solicitor is that complainants often have great difficulty in preparing written documents such as points of claim, and are often unable to set out the grounds and areas of discrimination adequately.

77. The President's Report summarises the complaint and identifies relevant areas of discrimination and grounds under which the complaint is made. If prepared appropriately, and if their status within the EOD is clearly understood, these Reports can be used by unrepresented parties as a summary of the complaint and in support of their case.

Recommendation

11. The role of the President's Report

The status of the President's Report ought to be decided, and perhaps more use made of the Report as a summary of the complaint.

Community consultation

78. Consultation with users of the Tribunal was part of the methodology for this project, and informed the recommendations. Users consulted were predominantly legal practitioners and special interest groups. Similar consultation on a regular basis will enable the Tribunal to monitor and evaluate its procedures, particularly in relation to their impact on litigants.

Recommendation

12. Community consultation

The Tribunal should conduct community consultation with members of the legal profession who appear on a regular basis before the Tribunal to allow the opportunity for feedback from the users of its services.

Interaction between the Anti-Discrimination Board and the EOD

79. The research raised a number of issues that highlight the need for communication and agreement between the two agencies, in particular:

- the format and role of the President's Report
- the changes in procedures in one agency affecting the procedures in the other
- scope for the ADT to provide assistance at EOD hearings
- the effect of the developing mediation practice of the EOD on the ADT's conciliation program

A regular forum could be established for the two organisations to discuss issues of mutual concern.

Recommendation

13. Liaison between the Anti-Discrimination Board and the Equal Opportunity Tribunal

It is essential for the ADB and the EOT to keep open lines of communication and liaise regularly on issues of mutual concern.

▶ Attachments and resource files

Bibliography

- Allars, M. "A General Tribunal Procedure Statute for NSW". *Public Law Review* vol. 4, , 1993, p.19.
- Allars, M. "Administrative Law, Neutrality, the Judicial Paradigm and Tribunal Procedure". 13 *Sydney Law Review* 377, 1991.
- Cameron, F. "NSW Administrative Decisions Tribunal, Scope for Inquisitorial Procedures in new ADT". *Law Society Journal*, August 1997.
- Combined Community Legal Centres Group (NSW). "The Trouble with Government Decisions". *Submission to the NSW Attorney-General on an Administrative Decisions Tribunal in NSW*, March 1997.
- Dwyer, J. "Overcoming the Adversarial Bias in Tribunal Procedures". *Federal Law Review*, 20:252, 1992.
- Farmer, J.A. "A Model Code of Procedure for Administrative Tribunals -- An illusory concept". *New Zealand University Law Review*, 4:105, 1970.
- Faulks. The Hon. J. *Self Representing Litigants*. Family Court of Australia, 7 August 1997.
- Genn, H. "Tribunals and Informal Justice". *Modern Law Review* 56:3, 1993.
- Gill, D. "Formality and Informality in the Administrative Appeals Tribunal". *Canberra Bulletin of Public Administration*, No.58, April 1989, pp.133-136.
- Goldring, J. *et al.* "Evaluating Administrative Tribunals". *Administrative Law Forum*, AIAL, 1993, p.160
- Henchcliffe, S. "Theory, Practice and Procedure, Fairness of Administrative Appeals Tribunal Hearings". 13 *Australian Bar Review*, 1995.
- McAllister, G. *Model Tribunal Procedures, Summary of Survey of NSW Tribunals*. Centre for Legal Process, June 1997.
- NSW Attorney-General's Department. *Disability Strategic Plan, 1997-2000*.
- Osborne, G. "Inquisitorial Procedure in the Administrative Appeals Tribunals -- A comparative perspective". *Federal Law Review*, 1982 13:150
- Public Interest Advocacy Centre, *Trouble with Government Decisions Tribunal for NSW*. March 1997
- Simpson, J. "Procedures for a Tribunal's Purpose". *Administrative Law Journal*, vol.21, no.3, June 1996
- Verkuil, P.R. "A Study of Informal Adjudication Procedures". 43 *The University of Chicago Law Review*, 739, 1976

Acknowledgements

Thank you to all who assisted and contributed to the project, with special thanks:

- to the Law Foundation of NSW and the Equal Opportunity Division of the Administrative Decision Tribunal of NSW
- to the Steering Committee for their guidance, support and encouragement
- to Gillian McAllister for providing copies of the relevant literature
- to the Justice Research Centre, Professor Ted Wright and Associate Professor Rosemary Hunter
- to all the Tribunals who gave their time to complete the survey and provide information

Publication details

Report prepared by Mary Mervat Rebehy BA (Hons Psych) BAB, Dip. Leg. Prac.

© Law Foundation of New South Wales, 2000

Any opinions expressed in this publication are those held by members of the Steering Committee during the project and do not necessarily reflect the views of the individual committee members or of the Law Foundation's Board of Governors.

This publication is copyright. It may be reproduced in part or whole for educational purposes as long as proper credit is given to the Law Foundation of New South Wales, the Equal Opportunity Division of the Administrative Decisions Tribunal NSW and the author.

ISBN 0 909136 72 6

Published by the Law Foundation of New South Wales

June 2000

Recommendations

The Steering Committee

List of the Tribunals surveyed

- ¹ Now the Consumer Claims Division of the Fair Trading Tribunal
- ² Now the Equal Opportunity Division of the Administrative Decisions Tribunal
- ³ Now the Legal Services Division of the Administrative Decisions Tribunal
- ⁴ Now the Residential Tribunal

Background: The Equal Opportunity Division of the NSW Administrative Decisions Tribunal

Introduction to the project

Discussion

Bibliography

Acknowledgements

Publication details

© 2006 Law and Justice Foundation | Privacy Policy | Disclaimer | Copyright Notice | Last updated | Built by itechne. Powered by edDesk™